Supreme Court, U.S.
FILED
DEC 21 2009
OFFICE OF THE CLERK

No. 08-1596

In The Supreme Court of the United States

TRACY RHINE, PETITIONER

v.

CARL DEATON, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS SECOND DISTRICT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC059)
Austin, Texas 78711-2548
(512) 936-1700

QUESTIONS PRESENTED

1. Whether petitioner may invoke 28 U.S.C. 1257(a) to present two claims under the federal Constitution, neither of which was squarely pressed or passed upon in state court.

2. Whether petitioner's rights under the Due Process Clause of the Fourteenth Amendment were violated, in a parental termination suit, by the combined effect of (i) the trial court denying her request for appointed counsel under *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), (ii) the trial court denying her request for a free transcript on appeal under *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), and (iii) the appellate court failing to correct the first two errors *sua sponte*—notwithstanding that petitioner raised neither claim on appeal and the facts underlying her claims are disputed.

3. Whether the Texas statutory framework for appointing counsel to represent indigent parents in termination suits, which provides counsel in all government-initiated suits and on a case-by-case basis in private suits, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Statement 1

Discussion 5

A. Review is inappropriate because petitioner's federal claims were not pressed or passed upon below 6

B. Petitioner's due process claim does not warrant review because it raises a splitless, fact-bound question that carries no importance beyond this case 16

C. Petitioner's equal protection claim does not implicate any meaningful split and otherwise lacks merit 20

Conclusion 25

TABLE OF AUTHORITIES

Page

Cases:

Adams v. *Robertson*, 520 U.S. 83 (1997) (per curiam) ..... *passim*

In re Adoption of K.L.P., 763 N.E.2d 741 (Ill. 2002) 21

Bankers Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71 (1988) 8, 12

Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 7, 12, 13

Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 15

Cohen v. *Cowles Media Co.*,
501 U.S. 663 (1991)..... 10

Eddings v. *Oklahoma*, 455 U.S. 104 (1982)..... 9

Gen. Servs. Comm'n v. *Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001) 15

Gideon v. *Wainwright*, 372 U.S. 335 (1963)... 14

Herb v. *Pitcairn*, 324 U.S. 117 (1945) 15

Howell v. *Mississippi*, 543 U.S. 440 (2005) (per curiam) 7, 8, 13, 16

Illinois v. *Gates*,
462 U.S. 213 (1983)..... 7, 8, 10, 12

Lassiter v. *Dep't of Soc. Servs.*,
452 U.S. 18 (1981) ..... *passim*

Mathews v. *Eldridge*,
424 U.S. 319 (1976)..... 16, 19

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940)... 7, 11

Mich.-Wis. Pipe Line Co. v. *Calvert*,
347 U.S. 157 (1954)..... 10

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996)..... *passim*

Murdock v. *City of Memphis*,
87 U.S. (20 Wall.) 590 (1875) 15

New York ex rel. Bryant v. *Zimmerman*,
278 U.S. 63 (1928) 8, 9

Plyler v. *Doe*, 457 U.S. 202 (1982) 23

Sanchez-Llamas v. *Oregon*,
548 U.S. 331 (2006)..... 16

Sochor v. *Florida*, 504 U.S. 527 (1992) 15

United States v. *Salerno*,
481 U.S. 739 (1987) 22

Vacco v. *Quill*, 521 U.S. 793 (1997) 22

Webb v. *Webb*, 451 U.S. 493 (1981) 9, 12

Wood v. *Georgia*, 450 U.S. 261 (1981) 13

Yee v. *City of Escondido*,
503 U.S. 519 (1992) 7, 10

Constitution, statutes, and rules:

U.S. Const. amend XIV, § 1 ..... *passim*

18 U.S.C. 3006A(a)(2) 24

28 U.S.C. 1257(a) (2006) ..... I, 5, 6, 7

28 U.S.C. 1257(1)-(2) (1982) 7

Judiciary Act of 1789, 1 Stat. 85-86 7

Sup. Ct. R. 10 17

Sup. Ct. R. 14.1(g)(i) 7, 9

Tex. Civ. Prac. & Rem. Code Ann. 13.003 2

Tex. Fam. Code Ann.:

101.032(a) 1

102.003(a)(5) 1

102.003(a)(12) 1

107.013(a)(1) ..... *passim*

107.015 2

107.021 ..... *passim*

109.003(a) 2

263.401(a) 2

Tex. R. App. P. 20.1 ..... 2, 4, 17

Miscellaneous:

Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* (6th ed. 2009) 8, 13

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 7

Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128 (1986) 7

Supreme Court of Texas Internal Operating Procedures (Apr. 17, 2009) 4

16B Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996) 7

In The
Supreme Court of the United States

No. 08-1596

TRACY RHINE, PETITIONER

v.

CARL DEATON, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS SECOND DISTRICT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General of Texas to express the views of the State of Texas. In the State's view, the petition for a writ of certiorari should be denied.

STATEMENT

1. Chapter 161 of the Texas Family Code authorizes the termination of a parent-child relationship through civil actions. See Tex. Fam. Code Ann. 101.032(a). Such suits may be initiated by private parties, including foster parents, or by the government itself, often acting through the Child Protective Services Division of the Texas Department of Family and Protective Services. See Tex. Fam. Code Ann. 102.003(a)(5), 102.003(a)(12). The Code imposes different procedural rules for private and government-initiated actions. There is, for example, a one-year deadline for commencing trial in

government-initiated suits, but not in private suits. Tex. Fam. Code Ann. 263.401(a).

Texas grants indigent parents various procedural benefits in termination suits, including (where appropriate) court-appointed counsel. Indigent parents are automatically entitled to counsel, at public expense, in government-initiated suits. Tex. Fam. Code Ann. 107.013(a)(1), 107.015(c). Although the same right is not automatic in private suits, counsel may be appointed in the court's discretion. Tex. Fam. Code Ann. 107.021, 107.015.

Texas law also provides indigent parents a free copy of the trial transcript, at public expense, once indigence is established. Tex. Fam. Code Ann. 109.003(a); see also Tex. Civ. Prac. & Rem. Code Ann. 13.003. Courts may also authorize only partial payment of the transcript fee and postpone the deadline for full payment. See Tex. R. App. P. 20.1(k), (l).

2. Petitioner gave birth in Dallas County to a child, J.C., who tested positive for PCP upon delivery. Pet. App. 4a. Child Protective Services immediately placed J.C. in foster care with respondents, who reside in Tarrant County. *Ibid.* Child Protective Services thereafter initiated a termination suit against petitioner in Dallas County; respondents' motion to intervene was denied. *Ibid.*

Child Protective Services subsequently nonsuited the Dallas County action, and on the same day, respondents initiated this private termination suit in Tarrant County. Pet. App. 4a-5a. Although described as "a coordinated maneuver" between Child Protective Services and respondents, the

government dismissed its action "[b]ecause the statutory deadline for disposition of the termination suit was approaching and for other reasons not relevant to this appeal," *ibid.* (footnote omitted).

Acting *pro se* in respondents' suit, petitioner claimed indigence and requested counsel. Pet. App. 5a. In support of this request, petitioner did not assert a right to appointed counsel under federal law. See Pet. 3-4. The trial court denied her request: as the birth mother in a private termination suit, petitioner was not automatically entitled to appointed counsel under Section 107.013(a)(1), and the court declined a discretionary appointment under Section 107.021. Pet. App. 5a.

Following a bench trial, the court found termination in the child's interest, ordered petitioner's rights terminated, and appointed respondents as managing conservators. Pet. App. 12a-13a.

3. Petitioner appealed to the Court of Appeals for the Second District of Texas and requested appellate counsel. In response to this request, the court of appeals abated the appeal to the trial court, which again declined to appoint counsel. Pet. App. 7a. Thereafter, proceeding *pro se*, petitioner raised four state-law issues but no federal claims, see *ibid.*; "[t]hough [petitioner] complained of her lack of counsel, she did not raise due process or equal protection arguments," Pet. 5.

As to three of petitioner's state-law issues—challenging sufficiency of the evidence, a credibility determination, and a bonding assessment—the court of appeals found review foreclosed without the trial

transcript. Pet. App. 7a-8a. As the court explained, petitioner below had claimed an inability to cover appellate costs, but respondents contested her indigence affidavit under Texas Rule of Appellate Procedure 20.1. Pet. App. 6a. The trial court determined petitioner was at least partially indigent, waiving most costs but ordering her to pay $405 for the transcript. *Id.* at 6a-7a. (The parties dispute the order's factual basis: petitioner contends (Pet. 6) the court ordered her to pay despite finding her indigent, while respondents assert (Br. in Opp. 5-6) petitioner was found able to afford the transcript.) Petitioner did not pay the fee and consequently forwent a transcript. Pet. App. 7a. Petitioner did not appeal the indigence determination. *Id.* at 6a-7a & n.3.

The court of appeals addressed petitioner's fourth state-law issue—her claim to appointed counsel—on the merits. Pet. App. 8a. The court noted that, as a private (not government) termination suit, petitioner was not automatically entitled to counsel under Section 107.013(a)(1). Pet. App. 8a. The court also found no abuse of discretion in refusing to appoint counsel under Section 107.021. Pet. App. 8a. The court accordingly affirmed the judgment terminating petitioner's parental rights. *Id.* at 9a.

4. Petitioner, proceeding *pro se*, sought discretionary review in the Supreme Court of Texas, but again failed to present any federal claims. Pet. 7. The court requested merits briefing before acting on her petition, as it does in 25% of petition-stage cases. See *Supreme Court of Texas Internal Operating Procedures* 13 (Apr. 17, 2009), available at http://www.supreme.courts.tx.us/pdf/SCIOPs.pdf.

In merits briefing, prepared by *pro bono* counsel, petitioner for the first time raised a pair of federal claims under the Fourteenth Amendment. Pet. 7. First, petitioner argued that the denial of counsel, a transcript, and appellate review, operated together to violate the Due Process Clause. Second, petitioner argued that Sections 107.021 and 107.013(a)(1) of the Texas Family Code violate the Equal Protection Clause, by automatically providing counsel in government termination suits but not in private termination suits. Without addressing the merits, the court denied the petition. Pet. App. 1a-2a.

DISCUSSION

Petitioner raises two federal claims that were not squarely pressed or passed upon in state court. Under the text of 28 U.S.C. 1257(a) and a long line of decisions, this fact is fatal to the Court's appellate jurisdiction. This rule protects the strong interests of federalism and comity, avoids problems associated with resolving constitutional questions on an undeveloped record, and allows state courts to construe local statutes so as to avoid constitutional conflicts in the first place. Because this rationale applies here with full force, and nothing otherwise justifies an exception to this settled practice, the petition should be denied.

In any event, petitioner's federal claims are insubstantial. Her due process claim is fact-bound and case-specific, and the constitutional standards she seeks to invoke—under *M.L.B.* and *Lassiter*—are already enforced by Texas courts and codified in Texas law. Review is not warranted to apply settled standards to petitioner's unique situation.

Petitioner's splitless equal protection claim mounts a facial challenge to a statutory framework with a plainly legitimate sweep: because appointed counsel is authorized, at the court's discretion, in private actions, petitioner is incorrect that the statutory scheme is invalid in all its applications. Nor, indeed, is it invalid in *any*: it is not irrational for Texas to appoint counsel automatically when a parent faces the vast resources of the State but to act case-by-case when the plaintiff is a private party. Petitioner is wrong that the Constitution forbids States from providing counsel a step above the constitutional floor without being ordered to provide counsel automatically in every case. Further review is not warranted.

A. Review Is Inappropriate Because Petitioner's Federal Claims Were Not Pressed Or Passed Upon Below

Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. 1257(a), but she is mistaken. Petitioner presents two questions of federal law. By her own admission, however, neither was pressed in state court, and only one was even debatably passed upon—for the limited purpose of noting it had been *waived*. This Court's longstanding rule, resting on jurisdictional limits and sound practice, has been to refuse to upset state-court judgments on federal grounds never raised or resolved below. Because petitioner has no basis for departing from this traditional rule or its controlling rationale, her petition should be denied.

1. Petitioner cannot meet Section 1257(a)'s threshold presentation requirement. Under that statute and its antecedents, Congress has long

restricted this Court's appellate jurisdiction over state-court judgments to cases where federal rights are "specially set up or claimed" or a statute is "drawn in question" on federal grounds. 28 U.S.C. 1257(a) (2006). The Court has accordingly "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)); see *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); Sup. Ct. R. 14.1(g)(i); Eugene Gressman et al., *Supreme Court Practice* 183 (9th ed. 2007); 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4022, at 322 (2d ed. 1996).[1]

Although a "long line of cases" have "clearly stat[ed] that the presentation requirement is jurisdictional" in nature, a "handful" of relatively recent exceptions have raised the question whether the requirement is truly jurisdictional. See *Howell*, 543 U.S. at 445; *Adams*, 520 U.S. at 90; *Yee* v. *City of*

---

[1] This jurisdictional limitation dates back to the Judiciary Act of 1789, 1 Stat. 85-86. See *Gates*, 462 U.S. at 217-218. The current text of Section 1257(a) does not specify where a federal claim must first be invoked, but earlier iterations textually reference the state court's disposition, confirming that such claims had to be raised in state court. See, *e.g.*, 28 U.S.C. 1257(1)-(2) (1982); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1163 (1986).

Escondido, 503 U.S. 519, 533 (1992) (noting "very rare exceptions"); *Gates*, 462 U.S. at 217-219; Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 497 (6th ed. 2009) [hereinafter *Hart & Wechsler*]. But however that question is ultimately resolved, this longstanding "rule"—and it is consistently characterized as a *rule*, *e.g.*, *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988)—still imposes a powerful "requirement" that "prevents" consideration of unpreserved claims, *Howell*, 543 U.S. at 443.

2. Petitioner has not demonstrated that she satisfies the presentation requirement.

a. Petitioner has not only failed to establish that her claims were timely presented, see, *e.g.*, *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) (federal claims must be "brought to the attention of the state court with fair precision and in due time"), but she has affirmatively conceded that her federal claims were not pressed below: "Though Ms. Rhine complained of her lack of counsel, she did not raise due process or equal protection arguments." Pet. 5.

That concession is correct. Under settled law, it is inadequate to request counsel or a free transcript in general or generic terms. Unless the issue is described in terms that specify the objection is *federal* in nature, it is deemed insufficient, as a matter of law, to put the state court on notice that it has been presented with a federal claim. See, *e.g.*, *Howell*, 543 U.S. at 444 & n.2 (requiring citation to federal law or case decided on federal grounds, or a label indicating that claim is "federal"); *Adams*, 520 U.S. at 89 n.2 (holding that "passing invocations of 'due process'" in state-court briefing "did not meet

our minimal requirement that it must be clear that a *federal* claim was presented"); *Zimmerman*, 278 U.S. at 67-68 (finding insufficient claim "that the state statute was 'unconstitutional' [but] contain[ing] no mention of any constitutional provision, state or federal"). To be sure, "citation to book and verse" is not required, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 n.9 (1982), but "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts," *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

Review of the state-court opinions and cert.-stage filings reveals that no federal claim was raised here. Petitioner's four issues on appeal were articulated in terms of state, not federal, law. Pet. App. 7a. Her only claim that even resembles her belated federal attack is the request for counsel—but that objection is more readily construed as a *statutory* claim under Texas law. This would explain, for example, why the state courts proceeded by asking whether a Texas statute granted her an entitlement to counsel. Pet. App. 7a-8a. Nothing, however, indicates her argument was rooted in federal law.[2]

In addition, petitioner did raise her federal arguments before the Supreme Court of Texas, see Pet. 7, but the presentation requirement is not

---

[2] The underlying record in state court is sealed. If the record shows that federal claims were pressed below, this Court's Rule 14.1(g)(i) required petitioner to "specif[y]" when and where the federal claims were raised, which she has not done. In any event, petitioner herself has confirmed the lack of any such evidence in the record. See Pet. 5.

satisfied when a party belatedly asserts an argument for the first time in a state court that declines *discretionary* review. See *Yee*, 503 U.S. at 533; *Adams*, 520 U.S. at 89 n.3. Once the state supreme court denied review, petitioner had to show how she preserved her federal claims in the last court that reached the merits. And for good reason: were this petition granted, the writ would run to the intermediate court of appeals, not the state supreme court. Pet. 1; see *Mich.-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 159-160 (1954). The court of appeals cannot be faulted for missing arguments in a brief that postdates its judgment and was filed in a different court.

b. Because petitioner did not press her federal claims below, she can only raise them now if the lower courts passed upon them *sua sponte*. See, *e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991). First, it is undisputed that the courts did not address petitioner's equal protection challenge to the statutory scheme for appointing counsel. See Pet. App. 1a-15a. Nothing in any opinion suggests an attempt to address a perceived unconstitutional disparity between the treatment of parents in private and government termination suits.

Nor is there any indication that the state courts resolved any component of petitioner's due process challenge. The lower courts did not, for example, address her request for counsel in federal terms, much less *constitutional* terms. That the court in passing (Pet. App. 8a) cited *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), does not prove otherwise. See *Gates*, 462 U.S. at 218 n.1 (requiring the claim to be "squarely considered and resolved").

Indeed, the court may simply have invoked *Lassiter* for the proposition that appointed counsel is presumptively *unavailable* in termination cases, see 452 U.S. at 25-27.

Moreover, while the court of appeals did briefly address the transcript issue and *M.L.B.* v. *S.L.J.*, 519 U.S. 102 (1996), it did so only in a footnote—and even then only to explain that petitioner had *not* challenged the order denying her a free transcript. See Pet. App. 6a-7a & n.3. Nothing within the four corners of the state-court opinion establishes that the court resolved a federal constitutional challenge.

3. Petitioner offers no principled basis for departing from the Court's presentation requirement in this case.

a. This venerable rule rests on a number of important considerations implicated here. It protects, first and foremost, the strong interests of federalism and comity: "due regard for the appropriate relationship of this Court to state courts requires * * * this Court * * * [to] refus[e] to consider any grounds of attack not raised or decided in" the state court. *McGoldrick*, 309 U.S. at 434-435; see also *Adams*, 520 U.S. at 90 ("it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider") (internal quotation marks omitted). Such concerns are particularly strong in this case. Petitioner challenges the constitutionality of a statutory framework for appointing counsel in termination proceedings. Regardless of why petitioner failed to attack the Texas Family Code below, her omission has deprived Texas courts of the critical "first

opportunity to consider the applicability of state statutes in light of constitutional challenge" and to construe the statutes "in a way which saves their constitutionality." *Cardinale*, 394 U.S. at 439.

Second, the rule reflects important "practical considerations," *Bankers Life*, 486 U.S. at 79: "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale*, 394 U.S. at 439; see also *Adams*, 520 U.S. at 90-91. Here, for example, had petitioner pressed the transcript challenge earlier, the record might clearly reflect whether petitioner was found able to pay and simply chose not to (as respondents contend) or instead was ordered to pay notwithstanding her indigence (as petitioner contends). This fact-intensive inquiry, not developed below, could disprove that the *M.L.B.* issue is even presented on these facts.

In addition, petitioner's failure to press her federal claims in state court suggests that any decision here might ultimately prove academic: a lurking independent and adequate state ground invoked upon remand could undercut this Court's disposition. See, *e.g.*, *Gates*, 462 U.S. at 222; *Webb*, 451 U.S. at 498 n.4. The presentation requirement "avoids [such] unnecessary adjudication" of constitutional issues. *Adams*, 520 U.S. at 90-91.

The circumstances here "justify no exception" from this longstanding requirement. *Id.* at 90.[3]

b. Contrary to petitioner's contention, the Due Process Clause does not compel a different outcome. It is settled that unrepresented litigants are fully capable of preserving their constitutional rights during trial and on appeal. Indeed, as the Court in *Lassiter* noted, this presumption applies in *all* cases

---

[3] Nor is *Wood* v. *Georgia*, 450 U.S. 261 (1981), to the contrary. The *Wood* Court addressed a due process challenge that was not raised or resolved in state court. See 450 U.S. at 264-265 & n.5. But the challenge was based on a defect in the state proceedings that *affirmatively prevented* the parties from pressing the claim: the challenge was based on *their own attorney's* conflict of interest, and the Court acknowledged the attorney's reluctance to identify his own conflict as a constitutional error. See *id.* at 265 n.5. Here, by contrast, nothing "in the state process prevented" petitioner from "raising [her] issue[s] in the first instance." Cf. *Hart & Wechsler*, *supra*, at 500. Moreover, in *Wood*, unlike here, no state statute was drawn in question on federal grounds; the federalism concerns underlying the presentation requirement were therefore much weaker. See *Cardinale*, 394 U.S. at 439. In addition, because the *Wood* petitioners had preserved a different federal claim, see *Wood*, 450 U.S. at 275 (White, J., dissenting), the Court had jurisdiction over at least that claim, and a remand was possible under 28 U.S.C. 2106 to consider the new question, see *Wood*, 450 U.S. at 265 n.5. Here, by contrast, there is no jurisdictional hook because *no* federal claims were raised or resolved in state court. Finally, were the Court to hold that *Wood* authorizes review here, it would also be forced to address the unresolved question whether the presentation requirement imposes a *jurisdictional* bar—a question that, if answered in the negative, might require overturning more than a century of precedent, see *Howell*, 543 U.S. at 445, a consequence not squarely considered in *Wood*.

(including termination suits) where imprisonment is not at stake. *Lassiter*, 452 U.S. at 25-27; see also *M.L.B.*, 519 U.S. at 112-113. This understanding cannot be squared with petitioner's novel constitutional theory, which would eviscerate the claim-preservation rules applied in state and federal courts for centuries.

Nor is there any limiting principle that might distinguish this situation from others involving *pro se* litigants and constitutional claims. Petitioner contends (Pet. Reply 1-2) that right-to-counsel claims under *Lassiter* are different (and cannot be waived), but she is wrong. *Lassiter* did not recognize a narrow and particular right to counsel because parents are unable to raise basic constitutional claims; the limited entitlement instead arose due to the need for counsel in the *underlying termination proceedings*. This is why *Lassiter* asks whether the proceedings are unusually complex, involve expert witnesses, or might lead to criminal sanctions. See *Lassiter*, 452 U.S. at 27-32. Every parent who is *not* protected by *Lassiter* must still raise every other constitutional objection that, according to petitioner, should be excused for *pro se* parties. So whereas the lack of counsel may excuse the failure to raise a sophisticated objection in a complex termination suit, it would not excuse the failure to assert the same constitutional challenges that all other indigent parties, who are not represented by counsel, successfully assert every day.

Nor does the extra latitude afforded *pro se* litigants eliminate the need to put state courts on notice of federal claims—even Gideon did that much. See *Gideon* v. *Wainwright*, 372 U.S. 335, 337 (1963)

(quoting *pro se* defendant's self-preserved claim). Petitioner's theory does not account for the serious interests, rooted in our constitutional structure, that would be undermined by a rule excusing *pro se* litigants from pressing federal claims in state court.

4. Independent of the presentation requirement, petitioner's *M.L.B.* claim is jurisdictionally defective for another reason: Even if the transcript issue were deemed passed upon (given the state court's limited declaration, in a single footnote, that the issue was not raised), an independent and adequate state ground would bar her claim. See *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875). In Texas, as elsewhere, a party waives any issue not argued in her appellate brief. *Gen. Servs. Comm'n* v. *Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 n.1 (Tex. 2001). Petitioner's failure to preserve the *M.L.B.* issue by raising it on appeal, as required by firmly established state procedural rules, constitutes an independent and adequate state ground precluding this Court's review. See, *e.g.*, *Sochor* v. *Florida*, 504 U.S. 527, 533-534 (1992).

Contrary to petitioner's contention (Pet. 14-18; Pet. Reply 1-4), invoking Texas's traditional error-preservation requirement with *pro se* litigants, even in termination actions, is consistent with due process. The federal Constitution does not require state appellate courts to "sit as self-directed boards of legal inquiry and research," giving *sua sponte* consideration to every potential trial error. *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). This view, if upheld, would fundamentally change the role of appellate courts in our adversarial

system: procedural default rules reflect the chief reliance "on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 356 (2006). Petitioner offers no precedent supporting a novel constitutional regime sweeping aside waiver rules for *pro se* litigants.

5. Because the presentation requirement, as a matter of power or prudence, warrants denial, this case presents a poor vehicle for resolving the question left open in *Howell* and *Adams*. But even if a prudential exception could save this petition, it is still a poor vehicle for another reason: there is no point in resolving the true nature of the presentation requirement only to reach fact-bound questions that do not independently call for review.

B. Petitioner's Due Process Claim Does Not Warrant Review Because It Raises A Splitless, Fact-Bound Question That Carries No Importance Beyond This Case

Petitioner contends that her federal due process rights were violated as a result of a combination of perceived errors: contrary to *M.L.B.*, she did not receive a free transcript for appeal; contrary to *Lassiter*, she was denied appointed counsel for the termination proceeding; and contrary to *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the state appellate court did not decide issues barred under ordinary error-preservation rules. Pet. 10-19. This case-specific argument does not warrant review.

1. Contrary to petitioner's contention (Pet. 6-7, 13, 14), Texas law does not flout *M.L.B.*'s holding

that an indigent parent is entitled to a free transcript when appealing a termination decree. See 519 U.S. at 107. After respondents contested petitioner's indigence, the trial court held a hearing to determine what appellate costs petitioner could afford. See Tex. R. App. P. 20.1(e), 20.1(k). The trial court sustained respondents' contest in part and ordered petitioner to pay for the transcript, while excusing other appellate costs. See Pet. App. 6a-7a. Because petitioner did not pay, she was not provided a transcript for her appeal.

This issue does not warrant review. There is no conflict between this Court's precedents and Texas law. As illustrated above, Texas provides a mechanism for obtaining a free transcript on appeal. And Texas courts—including the very court under review—apply *M.L.B.* and understand its holding. Pet. App. 6a n.3. If petitioner were entitled to a free transcript, the trial court's factual determination was incorrect. But that ruling was upheld not under the wrong constitutional standard, but because petitioner failed to invoke her rights (under federal *and state* law) in the first place.

In any event, petitioner's *M.L.B.* claim is predicated on a sharp factual dispute. The record does not clearly show why petitioner was forced to pay for the transcript. See Pet. App. 6a-7a & n.3; cf. *M.L.B.*, 519 U.S. at 109 (noting parent's *uncontested* indigence). On respondents' view, petitioner was denied a free transcript because she could afford the fee; on petitioner's view, the trial court ordered payment despite her indigence to benefit the court reporter. Pet. 6. That is a fact-bound question, not an important legal issue. Sup. Ct. R. 10.

There is no split or conflict with this Court's precedents; indeed, *M.L.B.* itself favorably cited an earlier iteration of Texas law as a statute *adhering* to the constitutional standard. See 519 U.S. at 122 n.13. The petition's fact-bound question does not require the Court's attention.

2. Petitioner contends (Pet. 13-19) that, under *Lassiter*, she was entitled to appointed counsel. Yet Texas law fully implements the *Lassiter* standard. Just as *Lassiter* commands (see 452 U.S. at 31), Texas courts are permitted to exercise discretion, on a case-by-case basis, to appoint counsel in private termination suits. See Tex. Fam. Code Ann. 107.021. This discretion is necessarily bounded by the Constitution, and hence it amounts to an abuse of discretion (under federal *and state* law) to refuse counsel in cases where *Lassiter* requires it. It is therefore clear that the Texas statutory framework is facially valid.

The only issue presented here, accordingly, is a fact-bound question whether, as applied to these particular circumstances, a single judge erred in a discretionary determination that counsel was not required—a determination petitioner has not shown was even presumptively incorrect. She has not, for example, cited the anticipated or actual use of expert testimony; highlighted the overwhelming complexity of the case or the sophistication of the legal issues; pointed to any danger of criminal liability; or demonstrated that any other *Lassiter* factors tip the balance in her favor. See *Lassiter*, 452 U.S. at 32-33.

This failure suggests petitioner lacks the factual support necessary for rebutting the presumption *against* the right to counsel. *M.L.B.*, 519 U.S. at 117.

But even with record support, this kind of narrow and case-specific issue does not rise to the level of importance warranting review. Cf. *Lassiter*, 452 U.S. at 32 (the due process inquiry is "answered in the first instance by the trial court," subject to appellate review).

Finally, petitioner appears to question whether state courts conducted a *Lassiter* analysis at all. Petitioner has not clearly shown, however, that the trial court ignored the *Lassiter* factors (or their equivalents) in declining to exercise its discretion, under Section 107.021, to appoint counsel. And, in any event, petitioner did not raise a *Lassiter*-based challenge in state court; had she done so, there is no reason to believe the lower courts (which were clearly aware of *Lassiter*, see Pet. App. 6a (citing it)) would not have conducted their analysis accordingly—had they not already performed the same case-by-case inquiry under Texas law.

3. Contrary to petitioner's contention (Pet. 16-18), the Constitution does not forbid state procedural rules that require parties to raise arguments or waive them. See *supra*, pp. 15-16. This alone suggests that petitioner's theory, under *Mathews* v. *Eldridge*, is unsound.

But petitioner's theory also fails here for a more fundamental reason. This was not an instance of Texas courts turning aside a *presented* issue because it was not preserved at trial. On the contrary, the court of appeals identified this issue *sua sponte*. To prevail here, petitioner therefore must expand her constitutional theory: she must not only show that States are obligated to abandon traditional error-presentation requirements, but also that due process

requires state courts to raise and resolve any federal issue found lurking in the record.

Nothing in the tradition or history of the Constitution requires such an extraordinary result. As with every State in the Union, Texas has an adversarial judicial system that depends on parties to press the contentions they wish courts to resolve. It is not the court's obligation to scour the record and uncover claims that a party could have raised. Petitioner cites no authority suggesting otherwise. In the absence of any conflict, this novel constitutional theory—threatening breathtaking changes in appellate courts nationwide—is particularly unworthy of review.

4. We do not doubt the fundamental importance of this matter to petitioner. The State itself has a strong interest in preserving parental rights, and the Texas statutory framework is designed to safeguard those rights while protecting the interests of children and third parties. But an isolated error in applying an otherwise valid scheme, though not insignificant, does not affect any substantial interests at a systemic level. The case-specific issues raised in the petition do not warrant further review.

C. Petitioner's Equal Protection Claim Does Not Implicate Any Meaningful Split And Otherwise Lacks Merit

Petitioner contends that Sections 107.021 and 107.013(a)(1) of the Texas Family Code violate the Equal Protection Clause by automatically appointing counsel to indigent parents in government-initiated termination suits but not in private suits. Pet. 19-

24. Even had this claim been raised or resolved below, the petition should still be denied.

1. There is no meaningful conflict requiring the Court's attention. Petitioner contends that the decision below conflicts with the decisions of four state courts (Pet. 20), but that is incorrect. As petitioner acknowledges, those decisions were based on violations of *state* law, not federal law. See Pet. 20 ("four * * * state supreme courts have concluded that [the appointment scheme] violates their respective state equal protection guarantees"). Although one court did equate the federal and state analyses, see *In re Adoption of K.L.P.*, 763 N.E.2d 741, 752 (Ill. 2002), that kind of shallow conflict does not present a compelling case for immediate review.

And petitioner's conflict is not just shallow, but nonexistent. Because the federal question was not pressed below, it was not passed upon by any Texas court. So on this particular question, Texas courts have *held* nothing. Were petitioner's constitutional analysis correct, it might prevail when actually presented to a state court. But it is premature to grant review on an assumption of what Texas courts *might* someday hold—assuming the constitutional question is not avoided on state-law grounds.

2. The petition also warrants denial because the claim is insubstantial on the merits: Sections 107.021 and 107.013(a)(1) of the Texas Family Code do not violate the Equal Protection Clause.

As a preliminary matter, petitioner has raised a facial challenge to "[t]he Texas statutory framework" on the ground that it "denies court-appointed counsel to some indigent parents while granting it to others."

Pet. 24. Such a constitutional attack is "the most difficult challenge to mount successfully." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). A statute is not facially unconstitutional merely because it "might operate unconstitutionally under some conceivable set of circumstances"—it must instead fail across the board. *Ibid.*

Petitioner cannot meet this heavy burden. Contrary to petitioner's contention (Pet. 20), it is not true that counsel is "arbitrarily with[eld]" from all indigent parents in private termination suits. Texas law grants courts discretion to appoint attorneys for indigent parents in private actions, see Tex. Fam. Code Ann. 107.021, and courts must exercise that discretion, at a minimum, to appoint counsel whenever due process requires it, see *Lassiter*, 452 U.S. at 31-32. Counsel is accordingly *not* "withheld" from an entire class of indigent parents under the statutory scheme. Because the Code has a plainly legitimate sweep—as at least some indigent parents in each category will receive the same appointed counsel—petitioner cannot "establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

3. Petitioner's equal protection argument even fails when re-cast as an as-applied challenge. The hallmark of equal protection is that like cases must be treated alike. See, *e.g.*, *Vacco* v. *Quill*, 521 U.S. 793, 799 (1997). But the two classes petitioner has identified are *not* alike. There is nothing arbitrary, as petitioner incorrectly suggests (Pet. 19-20), about separating defendants who face the government from defendants who face private parties. In government-initiated termination suits, the State's vast resources

are marshaled against the parent. See *Lassiter*, 452 U.S. at 28. The government attorneys are often experienced in the field and repeat players in the courts. And government-initiated prosecutions are more likely to yield criminal proceedings, magnifying the risks for indigent parents. Cf. *id.* at 27 n.3. The line Texas has drawn is supported by an important element of fairness: nowhere does the Constitution forbid the State's efforts to even the playing field when prosecuting a termination action against an indigent parent.

It is certainly true that the statutory right in government-initiated cases exceeds the bare constitutional minimum, see *Lassiter*, 452 U.S. at 33-34, and that this governmental benefit does not extend automatically to all indigent parents in private actions. But exact parity is not required when appointing counsel. See *M.L.B.*, 519 U.S. at 112-113 (finding the right "less encompassing"). There is nothing improper about a State instituting a categorical rule, as a prophylactic matter, designed to capture those cases that most often will require appointed counsel. Petitioner may disagree with the State's assessment, but it was rational for the State to conclude that private-suit defendants are not the same as government-suit defendants. See *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982) ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States.").

Nor is petitioner correct (Pet. 20-21) that strict scrutiny or other searching review governs her claim. See *M.L.B.*, 519 U.S. at 112-113 (noting the more lenient standard); *Lassiter*, 452 U.S. at 31-32 (holding that appointed counsel routinely is not

required in termination cases, notwithstanding the importance of parent-child relationships). The line in Texas law is not drawn based on suspect classes or fundamental rights. On the contrary, the statutory scheme turns on the identity of the *party bringing suit*. Parents sued by private parties are not a suspect class. This is much different from a statute, for example, that would appoint counsel only for members of one political party or one race. The line at issue here is neutral. Even if a level of scrutiny more stringent than rationality-review applies, the statutory distinction is sound.

At bottom, the statutory framework draws a sensible line, based on the considered judgment of the political branches, between classes of parties who are not similarly situated. Contrary to petitioner's contention, there is no constitutional command that States must appoint counsel in *every* case if they choose to appoint counsel anywhere above the constitutional floor. Cf. 18 U.S.C. 3006A(a)(2) (authorizing appointed counsel upon a determination that "the interests of justice so require"). Because petitioner's theory has not led to a mature split and is otherwise without merit, review should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant
Attorney General

DAVID S. MORALES
Deputy Attorney General
for Civil Litigation

December 2009

JAMES C. HO
Solicitor General
Counsel of Record

DANIEL L. GEYSER
JAMES P. SULLIVAN
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC059)
Austin, Texas 78711-2548
(512) 936-1700